TESTIMONY ON H.R. 2693

Submitted to the House Resources Committee
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by

Karen Steuer

Senior Policy Advisor

National Environmental Trust

On Behalf of the Following Organizations:

American Cetacean Society

Animal Protection Institute

Cetacean Society International

Defenders of Wildlife

Greenpeace

Humane Society of the United States

International Marine Mammal Project of Earth Island Institute

International Wildlife Coalition

National Environmental Trust

Natural Resources Defense Council

Oceana

Society for Animal Protective Legislation

Seaflow

The Ocean Conservancy

Whale and Dolphin Conservation Society

World Wildlife Fund

Mr. Chairman and Members of the Resources Committee:

My name is Karen Steuer. I am a Senior Policy Advisor to the National Environmental Trust, and I am testifying today on behalf of organizations supported by millions of Americans from Maine to Hawaii. Our groups represent a broad range of marine mammal expertise, including experience in field research on cetaceans and pinnipeds, working with whale watching operations, rescuing stranded whales and dolphins, participating in court-related actions to defend U.S. marine mammal protection laws, serving on take reduction teams, and drafting previous legislative changes to the Marine Mammal Protection Act (MMPA.)

We appreciate the opportunity to provide you with our views on H.R. 2693, and have the following comments on the provisions contained in the legislation, and on additional provisions we believe should be

included in the reauthorization of the Act. The following analysis follows the structure of H.R. 2693.

Section 4: Limited export authority. The bill corrects a problem created by the 1994 amendments to the Act, which allowed a Native of Canada, Greenland, or Russia to import legally obtained marine mammal products into the United States as part of personal travel or cultural exchange, but failed to address the export of those products at the end of the travel. We support this correction.

Section 5: Authorization of appropriations. We would strongly urge that the Committee consider increasing the authorization levels in H.R. 2693, which are considerably less than the agencies require to properly fulfill their obligations under the MMPA. In previous testimony before this Committee regarding changes to the statute proposed by the Department of Defense, we emphasized that in our view the arguments and characterizations raised by DOD did not arise from the language of the statute, but instead reflected process problems residing within the wildlife agencies. It would be disingenuous to insist that the agencies correct these problems, take on the additional burdens contained in this legislation and recommended elsewhere, and refuse to provide them with the funding necessary to complete those tasks. Increasing their obligations without concurrently increasing the authorization levels is a recipe for disaster -- for the agency, the statute, the stakeholders, and marine mammal conservation.

Section 6: Take reduction plans.

Non-commercial fisheries: We recognize that some non-commercial fisheries use gear similar or identical to commercial fishing gear and, as a result, are taking marine mammals at rates potentially equal to or greater than those in commercial fisheries. The 1994 amendments to the MMPA added Section 118 to the Act as a new bycatch management regime for commercial fisheries. In order for these provisions to be accurately and fairly implemented, they must now be extended to non-commercial fisheries where appropriate. However, we are concerned that the amendments proposed in H.R. 2693 are too narrowly focused and do not include all the references necessary to bring this subset of non-commercial fisheries under the authority of the MMPA's Section 118. The intention behind the language in H.R. 2693 is unclear; if the Committee's intention is to apply the Act equally to all fisheries which incidentally take marine mammals, we would recommend that the bill be amended to use the approach contained in sections 403 and 404 of the Administration's proposal.

Timelines: The goal of a take reduction plan is to reduce, within six months of implementation, the mortality or serious injury of marine mammals accidentally entangled in fishing operations to sustainable levels. H.R. 2693 would (1) delay this objective by three months; (2) nearly double the period for review and finalization of a take reduction plan; and (3) remove the existing requirement that a take reduction team be convened no later than 30 days following the publication of a stock assessment indicating that incidental takes for that stock exceed the Potential Biological Removal. These delays will result in potentially hundreds of additional marine mammal deaths, and we strongly oppose these amendments.

Unfortunately, NMFS' record on following the existing time frames and procedures for take reduction plans mandated by the Act is abysmal. For example, shortly after the 1994 amendments were enacted, NMFS stated that reduction of harbor porpoise bycatch was a priority, given the high levels of mortality and the likelihood that an Endangered Species Act listing was imminent. Regardless of their stated intentions, NMFS convened the team far behind the mandated schedule and, although the team reached consensus on a take reduction plan, the agency delayed publishing the plan for more than 18 months, during which time dozens, if not hundreds, more harbor porpoise were needlessly lost to incidental take.

In another example, NMFS did not convene a take reduction team for large whales until forced to do so through a lawsuit, although it was widely recognized that one of the species involved, the North Atlantic right whale, was highly endangered and clearly subject to unsustainable incidental takes in fishing gear. In response to the lawsuit, NMFS submitted a plan to the court. Political intervention resulted in NMFS substantially weakening the plan to the point at which it merely allowed existing fishing practices as bycatch reduction measures. As a result, incidental takes remain at unsustainable levels, and again the agency finds itself in court.

The agency can and should meet the current deadlines mandated by the Act. Extending the timeframes as H.R. 2693 does will resolve none of these problems, nor will it facilitate better implementation or conservation. The intention behind the procedures established in Section 118 was to bring all stakeholders together to reach consensus on methods of reducing unsustainable levels of incidental takes of marine mammals within a relatively short time frame. However, this approach can only be successful when

stakeholders enter the negotiations in good faith, understanding that the consensus-building process is the best option, and when the agency meets its statutory mandates. Rather than amend the Act to modify deadlines, we urge that Members of Congress and state officials refrain from intervening in the take reduction team process, and allow it to proceed with current statutory requirements. Under those circumstances, there is every reason to believe it will work.

Take reduction team members: We support the amendments in H.R, 2693 that would add broader agency representation to take reduction teams, including representatives from the office of NOAA General Counsel, law enforcement, NMFS fisheries scientists, and a representative of the appropriate NMFS Regional Administrator. We believe these changes can serve to provide crucial guidance to the team to ensure that the proposed measures can be easily translated into regulatory language, are enforceable, and are not in conflict with other fishery management measures. Adding this additional expertise during the early stages of the take reduction plan process should also assist the agency in ensuring more timely review and implementation of proposed take reduction plans.

Changes to take reduction plans: We support the amendment in H.R. 2693 requiring the Secretary to reconvene take reduction teams to explain differences between the draft plan proposed by the team and the published plan approved by the Secretary.

Support for take reduction efforts: The MMPA currently authorizes the Secretary to accept gifts, devises, and bequests to carry out Section 118, and H.R. 2693 clarifies that this authorization extends to observer, research, and education and outreach programs. It is our view that this provision will help to provide NMFS with the ability to work cooperatively and effectively with various user groups in the implementation of take reduction plans, and we support its inclusion.

Right whales and ship strikes: There is currently no provision in H.R. 2693 to address one of the greatest conservation threats to the most endangered large whale found in U.S. waters, the North Atlantic right whale. NMFS currently regulates fishermen, whose gear causes approximately 50% of the human-induced mortalities of this species, through the take reduction team process. However, the agency has to date made no attempts to regulate shipping traffic, even though ship strikes have been documented to cause just as many right whale deaths. We therefore propose including language in the reauthorization that would create a ship strike mortality reduction plan, using the take reduction plan model. We would be happy to provide the Committee with draft language.

Section 7: Pinniped research. Pinnipeds have never been the primary cause of the decline of a salmonid, nor has it been scientifically demonstrated that they have been a primary factor in the delayed recovery of a depressed salmonid species. Non-lethal deterrents hold the most promise to resolve the problems of “nuisance” animals and should be the first line of defense. NMFS has failed, however, to publish final guidelines on acceptable non-lethal deterrents. NMFS has also failed to give sufficient priority to dedicated research into the development of safe and effective non-lethal deterrents. Development of such deterrents will aid in reducing not only predation on threatened and endangered salmonid stocks, but also other conflicts between pinnipeds and humans.

We support H.R. 2693’s proposed amendment to provide for research into non-lethal removal and control of nuisance pinnipeds. We recommend, however, that this section of the bill be amended to: (1) require the Secretary to develop a research plan to guide research on the non-lethal removal and control of nuisance pinnipeds; (2) clarify that the development and testing of safe, non-lethal removal, deterrence and control methods shall provide for the humane taking of marine mammals by harassment; (3) include other organizations and individuals, such as the conservation community, in addition to representatives of commercial and recreational fishing industries, in the development of the research program; (4) require the Secretary to make the annual report to Congress available to the public for review and comment; and (5) authorize the Secretary to accept contributions to carry out this section, as in Section 118.

Section 8: Marine Mammal Commission. We oppose the provision in H.R. 2693 that states: “except that no fewer than 11 employees must be employed (by the Marine Mammal Commission) … at any time.” Removing this lower threshold may provide some members of Congress with an incentive to decrease appropriations and, in turn, staff capacity on the Marine Mammal Commission. Congress should instead rely on the Commission to fulfill the role for which it was originally created: to provide crucial expertise and guidance in the oversight and implementation of the Act. The Commission should be empowered to expand its authority to promote and undertake visionary dialogues and strategic thinking that will advance the purposes and policies of the MMPA.

We support the provision to change the per diem rate in the Act, which in our opinion is too low. Consequently, the current provision precludes the Marine Mammal Commission from securing the services of most experts and consultants. By removing this restriction, the Commission will be brought under the government-wide restrictions for the payment of experts and consultants.

We recommend that the authorization of appropriations proposed for the Marine Mammal Commission be increased to a more realistic figure of $3,400,000.

Section 9: Scrimshaw exemption. We do not oppose this provision, which extends the permits for individuals with pre-ESA ivory, to allow them to continue to possess, carve, and sell the ivory until 2007.

Section 10: Polar bear permits. In 1994, Congress provided for the issuance of permits authorizing the importation of trophies of sport-hunted polar bears taken in Canada, subject to certain findings and restrictions. The amendments required the public to be given notice prior to and after issuance or denial of such permits. H.R. 2693 proposes to change this public notification process to a semiannual summary of all such permits issued or denied. We oppose this provision, as it would establish a blanket exemption to the notice and comment requirement and institute a dangerous precedent under which permits could be issued or denied without much-needed public scrutiny. The public comment process surrounding the issuance of a permit to import polar bear parts is needed to provide public oversight to verify that a permit is tied to tagging that clearly demonstrates when, and from what stock, the polar bear was taken. Rather than removing the public comment process, the Fish and Wildlife Service should work to ensure that these provisions are effectively enforced and do not result in the illegal take or a negative change in the status of stocks that are currently depleted.

Section 11: Captive release prohibition. We support the provision in H.R. 2693 amending the MMPA to clarify that the Act expressly prohibits any person subject to the United States' jurisdiction from releasing a captive marine mammal unless specifically authorized to do so. In the absence of mandatory precautionary measures established as conditions of a captive release permit, potential harm might result, to both the animals released and to wild populations they encounter, in the form of disease transmission, inappropriate genetic exchanges, or disruption of critical behavior patterns and social structures in wild populations. Any such permit requirement must be subject to the same jurisdictional and public review requirements that apply to other MMPA permits.

Section 12: Stranding and entanglement response. Each year a growing number of marine mammals become entangled in fishing gear and other marine debris. It is important that NMFS and FWS have the explicit authority to collect information on these entanglements and to grant authorization to selected organizations or individuals to disentangle animals whose lives are threatened. Disentanglement has proven to be an effective mitigation measure for humpback whales, northern fur seals, California sea lions, and Hawaiian monk seals, and has proven to be significant to the survival of the North Atlantic right whale. These efforts promote the conservation and recovery of these species and should continue as a matter of priority. To improve efforts to monitor and respond to entanglement threats to marine mammals, we support the proposed amendments to Title IV of the MMPA to include entanglement situations and to define the term "entanglement".

Section 13: Definition of harassment. On May 6 the Resources Committee held a hearing on changes proposed to the MMPA by the Department of Defense, among them a change to the definition of harassment. During that hearing, many of the organizations represented by this testimony expressed grave concerns regarding the proposed changes. We noted that in our view any problems with the existing harassment definition are not due to ambiguities in the statutory language, but to fundamental process problems, including: inconsistency in reviews of permit applications, conflicts in the process that dovetails the MMPA with the National Environmental Policy Act, and a lack of cooperation among federal agencies. If the problem lies in process issues that go uncorrected, changing the definition is likely to result only in more confusion, more delays in granting permits, and more lawsuits. Nothing will be gained, and marine mammal conservation will undoubtedly suffer as a result.

The current definition of "harassment", added to the Act in 1994, is –

"The term 'harassment' means any act of pursuit, torment, or annoyance which –

(Level A) has the potential to injure a marine mammal or marine mammal stock in the wild; or

(Level B) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering."

H.R. 2693 would shift the burden for Level A harassment from "has the potential to injure" to "has the probability to injure." We oppose this change, and are of the view that the proposed language is far more ambiguous than the existing definition. The term "potential" is clear and requires no further evaluation of the probability of injury, whereas "probability" is undefined, subjective, and likely to result in confusion among potential permittees. An example of the inherent difficulty with the "probability" would be the issue of ships entering Boston Harbor, transiting a National Marine Sanctuary and habitat for a number of endangered or threatened large whales. Evidence shows that ships entering Boston do occasionally strike and kill whales: the potential for ship strike is clear, and dictates that preventative measures should be mandated to the extent practicable. But the probability of an individual ship striking and injuring a whale varies tremendously, depending on season, ship speed, number of ships entering the harbor on any given day, and other factors. It would be virtually impossible to determine or enforce, resulting in even more confusion among stakeholders.

H.R. 2693 also weakens the existing definition of Level B harassment by requiring a "biologically significant" disruption of activities, including, but not limited to, migration, breeding, care of young, predator avoidance, defense, or feeding. The legislation does not define the term "biologically significant disruption," nor is it a commonly used scientific term. ." The insertion of this term would add harmful and unnecessary ambiguity to the definition, increasing regulatory uncertainty for regulated entities, and potential risk for protected marine mammals.

Finally, the bill would add the Administration's proposed third tier of harassment to include activities "directed toward" a specific animal or group of animals and "likely to impact" those animals by "disrupting behavior". While we recognize the intent in using this tier to regulate activities such as dolphin feeding, we would reiterate previously expressed concerns regarding "directed" activities. In our view, this definition would also apply to scientific research and whale watching operations. We would also note that the permitting standard included in this provision of "disrupting behavior" differs from the standard included in the other section of Level B harassment, which requires a "biologically significant disruption."

If the Committee adopts this approach, it has in effect created three different standards of ambiguously defined harassment without any clarification as to which standards would apply to whom and under what circumstances. If enacted, we have little doubt that this definition will result in far more confusion, more lawsuits, and less protection for marine mammals, and that we will be debating yet another approach to the definition in the next reauthorization of the MMPA.

Our organizations urge the Committee to instead retain the current definition of Level A harassment, and to amend Level B harassment as follows:

any act that disturbs or has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of biologically significant activities, including, but not limited to, breathing, communication, sheltering, migration, breeding, care of young, predator avoidance or defense, and feeding or foraging.

This definition is similar to that proposed by the National Research Council, and has the added advantage of replacing the Committee's proposed "biologically significant disruption" with the far more easily understood and scientifically definable "biologically significant activities." It also clarifies the concern expressed by others that the current definition could apply to de minimus activities – with the addition of the descriptive term "biologically significant activities," de minimus activities are specifically excluded from consideration. In addition, by defining harassment as "any act that" there is no need for a separate clause related to directed activities, as any act includes both incidental and directed activities.

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Section 14: Incidental takings of marine mammals. H.R. 2693 proposes to eliminate key conservation elements that restrict the scope of incidental take to "small numbers" of marine mammals while engaging in a specified activity "within a specified geographic region." We oppose the removal of these provisions.

Retention of these limitations is a vital component of the conservation principles embodied in the MMPA. Under the current language, regions of operation and numbers of animals impacted are drawn as narrowly as possible to accomplish the proposed activity; environmental review then takes place on that basis. The status of marine mammal conservation varies from species to species and from ocean to ocean, and requires that activities be considered on a case-by-case basis. Geographic regions serve different biological purposes for different species, and actions that have little or no impact on one species within a specified region may have grave consequences for another.

Finally H.R. 2693 proposes to establish a general authorization for incidental takes. The intent of this provision is unclear. Unlike other general authorizations in the MMPA that limit the scope of the authorization to a particular activity and type of take (such as commercial fishing), this authorization applies to any activity; does not restrict the scope of the take; is of unlimited duration; has no requirement for the applicant to provide information on the type of activity or number of animals impacted, proposed monitoring and mitigation measures; and has no requirements for reporting. In effect, this broad authorization creates an escape clause that allows user groups to bypass the incidental take permitting process entirely, and we believe there is no basis for a general authorization of this scope, which would render the MMPA's conservation goals and mandates virtually meaningless.

Conclusion. It is our view that many of the most important provisions of the MMPA, including the harassment definition and conditions for incidental takes of marine mammals, would be significantly weakened by H.R. 2693. We urge the Committee to consider these concerns, and look forward to working cooperatively with the Members and staff on these issues in the future.

[I1]Or something to this effect?